IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. [illegible]

CITIZENS UTILITIES COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JESSE CLIMENKO
Counsel for Petitioner
300 Lexington Avenue
New York 17, New York

REUBEN GOLDBERG
Wyatt Building
Washington, D. C.

CLIFTON G. PARKER
Morrisville, Vermont
Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Citizens Utilities Company, respectfully prays that a Writ of Certiorari issue to review the Decree of the United States Court of Appeals for the Second Circuit entered in this case on June 7, 1960.

CITATIONS TO OPINIONS BELOW

The Decision of the Chief Presiding Examiner of Respondent Federal Power Commission (R. 1572-1624),[1] is unreported. The Opinion and Order of Respondent Federal Power Commission (R. 1738-1755), is reported at 21 FPC 233.[2] The Opinion of the Court of Appeals for the the Second Circuit is reported at 279 F. 2d 1 and is printed in Appendix B hereto, *infra*, pp. 3a-7a.

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[1] In accordance with the Order of the Court of Appeals dated July 22, 1959, page references are to the pagination of the Record as certified by Respondent to the Court of Appeals.

[2] In view of the filing in this Court of nine copies of the Joint Appendix in the Court of Appeals, the Decision of the Chief Presiding Examiner and the Opinion and Order of Respondent are not reproduced in the Appendices to this Petition.

JURISDICTION

The Decree of the Court of Appeals was entered on June 7, 1960 (Appendix B, *infra*, p. 8a). Petitioner's timely Petition for Rehearing was filed on June 8, 1960 (R. p. 644), and denied on June 13, 1960 (R. pp. 656-657). The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Under Section 23(b) of the Federal Power Act, does Commission jurisdiction attach to dams located on reaches of a stream which are not navigable waters of the United States, where the Court fails to find and the record fails to show that any part of the stream is "used or suitable for use for the transportation of persons or property in interstate or foreign commerce?"

2. Does the Federal Power Commission automatically have jurisdiction over dams located on non-navigable reaches of a stream, on the sole ground that such dams, inevitably delaying the passage of water to downstream navigable waters of the United States, necessarily have the "effect" upon the interests of interstate or foreign commerce required by Section 23(b) of the Federal Power Act?

STATUTES INVOLVED

The statutory provisions involved are Sections 3(8) and 23(b) of the Federal Power Act, Title 16 U. S. C. §§ 796(8) and 817. They are set out in Appendix A, *infra*, pp. 1a to 2a.

STATEMENT

Petitioner owns and operates a small electric utility in northern Vermont. Its facilities include certain dams and appurtenant power stations located on and adjacent to the Clyde River.

Clyde River is 27 miles long. It lies wholly within the State of Vermont. The Clyde empties into Lake Memphremagog in the City of Newport, Vermont (R. 1201, 1202, 1214 *et seq.*, 1284 *et seq.*). The Lake lies partly in the United States and partly in Canada (R. 1583, 1742).

It is conceded that the Clyde, and Petitioner's facilities thereon, had, and can have, no effect, physical or otherwise, on Lake Memphremagog (R. 1040-1052, 1409 *et seq.*).

The Clyde is the smallest, most insignificant stream over which Respondent has ever attempted to assert its jurisdiction. Its physical characteristics are singular. The Clyde's profile shows a total fall of 490 feet from its source to its mouth, an average of approximately 19 feet per mile. In the 11¾ mile section closest to the mouth of the stream there is a fall of 460 feet, an average of approximately 40 feet per mile. Between the end of the second mile of the stream and its mouth, there is an aggregate fall of 196 feet, an average of 98 feet per mile (R. 356 *et seq.*, 862, 1284 *et seq.*, 1372, 1586).

Petitioner's Unit No. 11, a small generating facility operated in conjunction with an upstream diversion dam, is located one mile from the mouth of the Clyde. Generating Units 1, 2 and 3 are located one and one-half miles upstream from the mouth of the Clyde (R. 1387 *et seq.*, 1472 *et seq.*). Petitioner's Clyde Pond Dam is located at the outlet of Clyde Pond, two miles upstream from the mouth of the stream (R. 1290).

On the eleventh mile of the stream Petitioner owns and operates another small dam and power station. On a tribu-

tary in mile 20 of the stream. Petitioner operates two dams at the mouths of two ponds.

The first 4800 feet of the stream from its mouth are at the water level of Lake Memphremagog (R. 631, 792, 789, 807, 1047-1049, 1079; 1824 *et seq.*). It is conceded that the level of the Lake is controlled by factors wholly extraneous to the Clyde and Petitioner's facilities thereon (R. 1040-1052, 1409 *et seq.*).

On November 30, 1956 (R. 1472 *et seq.*) Petitioner filed a Declaration of Intention with Respondent relating to its Unit No. 11. On June 24, 1957 (R. 1493 *et seq.*) Respondent instituted an investigation to determine whether it was in the public interest to issue an order to conserve and utilize the navigation and water resources of the Clyde River region. Respondent also directed a hearing on the Declaration of Intention.

Respondent's Order of June 24, 1957 recognized the need for proof on the issue of "commerce," i.e., that the Clyde was "used or suitable for use for the transportation of persons or property in interstate or foreign commerce." It recited the results of Respondent's preliminary investigation and stated that the Clyde (a) "* * * has been used for commerce, principally for the floating of forest products * * *," and (b) "* * * together with Lake Memphremagog in their natural condition, or with minor improvements, would be capable of transportation of persons and property in interstate or foreign commerce." The Order also noted a prior Commission proceeding (wherein Petitioner was not a party) which had referred to the alleged fact that in Colonial times the Clyde, together with certain other bodies of water, served as a "highway" for Indians between points in the New England colonies and points along the St. Lawrence River.

These three preliminary findings were each predicated on an assertion of use or suitability for use of the Clyde

for the transportation of persons or property to interstate or foreign commerce. In short, the cornerstone of Respondent's claim of jurisdiction was an assertion of the "navigability" of the stream under Section 3(8) of the Federal Power Act, Title 16 U. S. C. § 796(8). Nowhere in the June, 1957, Order was it even suggested that Respondent's jurisdiction attached or could attach on the theory that Petitioner's facilities, if not located in or on "navigable waters of the United States," would affect the interests of interstate or foreign commerce under Section 23(b) of the Federal Power Act, Title 16 U. S. C. § 817.

Hearings were held before Respondent's Chief Presiding Examiner. Based upon an "imposing and voluminous record" (R. 1753), the Chief Presiding Examiner wrote a lengthy Decision (R. 1572-1624) in which he concluded that the Clyde, in its entirety, was not "navigable waters of the United States"; that approximately only the first 4800 feet of the 27-mile stream were such "navigable waters"; that none of Petitioner's facilities were located in that 4800 foot reach of the stream; but nevertheless, that the operation of certain of Petitioner's facilities on upstream "non-navigable" reaches of the stream would affect the interests of interstate or foreign commerce in the "navigable" 4800 foot reach of the stream.

The Chief Presiding Examiner's Decision considered, appraised and rejected each of the three jurisdictional findings of "commerce" contained in Respondent's Order of June, 1957. He said (R. 1608):

> "No case which has come before this Commission * * *, no proceedings before federal courts have been cited in which the volume of commerce shown by proof was so small as that shown here."

Petitioner and Respondent filed exceptions to the Chief Presiding Examiner's Decision (R. 1644 *et seq.*, 1679 *et seq.*). Respondent Commission, by Opinion and

Order dated February 16, 1959, reversed the Presiding Examiner (R. 1739 *et seq.*). It held the entire Clyde River to be "navigable waters of the United States." It also held that even if the entire Clyde River was not such "navigable waters", the first 4800 feet thereof were, and the operation of Petitioner's upstream facilities affected the interests of interstate or foreign commerce in the first 4800 feet (R. 1739 *et seq.*).

Three of the five Commissioners joined in Respondent's Opinion. One Commissioner concurred in result only, his separate Opinion clearly indicating his dissent from the Commission's holding that the entire Clyde was "navigable waters of the United States." The fifth Commissioner did not participate (R. 1752 *et seq.*).

Respondent ordered Petitioner to file application for license (R. 1752). Respondent denied Petitioner's timely application for rehearing (R. 1756 *et seq.*, 1787 *et seq.*). Petitioner's compliance with the licensing direction of Respondent's Order was deferred pending completion of all review proceedings (R. 1787 *et seq.*).

Petitioner timely filed a Petition for Review in the United States Court of Appeals for the Second Circuit.

On May 24, 1960 the Court of Appeals made a Decision (Appendix B, *infra*, pp. 3a-7a) wherein it expressly declined to decide whether Respondent was correct in holding that the entire Clyde River was "navigable waters of the United States." Instead, assuming "navigability" of only the first 4800 feet of the stream, and without deciding whether any evidence supported a finding that such 4800 feet was "used or suitable for use for the transportation of persons or property in interstate or foreign commerce," the Court entered a limited affirmance of Respondent's Order. It held that the operation of Petitioner's dams came within Section 23(b) of the Act as affecting the interests of interstate or foreign commerce in the first 4800 feet of the stream.

The Court below specifically did not find that Petitioner's facilities "would" affect the interests of interstate or foreign commerce. Instead, the Court stated (Appendix B, *infra*, p. 6a):

> "It cannot be said that the 'effect' of the petitioner's control of so much water tributary to the navigable part of the river is so inconsiderable as to be beyond the scope of § 817; that is to say, that 'the interests of interstate or foreign commerce would' (not) 'be affected by the construction of a dam' of the kind here at issue."

The Court concluded that so long as *any* physical change could occur in navigable waters of the United States, caused by upstream operations in non-navigable waters of the United States (Appendix B, *infra*, p. 7a),

> "It is not necessary for us to measure how much variation will justify actual intervention by the Commission."
>
> "* * * it is apparent that the evidence was enough to prove that the petitioner's dams, without change and at the will of petitioner, are capable of 'affecting' temporarily the flow of water in the river below Unit 11. * * *"

The Court made no determination whether the "effect", whose finding it affirmed, was substantial or unsubstantial, adverse or beneficial.[1]

REASONS FOR GRANTING THE WRIT

1. Section 3(8) of the Federal Power Act, Title 16 U. S. C. § 796 (8) (Appendix A, *infra*, p. 1), defines navigable waters of the United States as

> "those parts of streams * * * over which Congress has jurisdiction under its authority to regulate com-

[1] Indeed, the places where the Court below purported to localize the "effect" of Petitioner's dams were in every instance *upstream* of the 4800 foot section it presumed to be "navigable" (Joint Appendix, pp. 648-651).

> merce with foreign nations and among the several States, and which * * * are used or suitable for use for the transportation of persons or property in interstate or foreign commerce * * *."

Section 23(b) of the Federal Power Act, Title 16 U. S. C. § 817 (Appendix A, *infra*, p. 1), provides that where projects are to be constructed in waters other than those defined as navigable waters of the United States, Respondent shall investigate such proposed construction

> "* * * and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction * * *"

such construction shall not proceed until a license has been applied for and issued by Respondent. If Respondent does not find such an effect, permission is granted for the construction of such project works in compliance with State law.

Whether Respondent's licensing jurisdiction be asserted under Section 3(8) or under Section 23(b) of the Federal Power Act, Congress' power, and Respondent's licensing power in turn, are founded upon the Commerce Clause of the Constitution. United States Const., Art. I, § 8, Cl. 3. The project works must either be located in or on navigable waters of the United States or, if located on waters which are not navigable waters of the United States, must affect the interests of interstate or foreign commerce in other navigable waters of the United States. In either event, the "commerce" cornerstone of jurisdiction must be satisfied. This Court, and other Courts, have consistently so held. *Leovy* v. *United States*, 177 U. S. 601, 632-634 (1900); *The Daniel Ball*, 77 U. S. 557, 563 (1871); *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 404 (1940); *Oklahoma* v. *Texas*, 258 U. S. 574, 591 (1922); *Gulf & I. Ry. Co. of Texas* v. *Davis*, 26 F. 2d 930,

933 (D. C. Texas, 1928); *Iowa-Wisconsin Bridge Co.* v. *United States*, 84 F. Supp. 852, 896 (C. Cl. 1949), cert. den. 339 U. S. 982 (1950); *United States* v. *Cavalliotis*, 105 F. Supp. 742 (D. C. N. Y. 1952).

The Decision below permits jurisdiction under Section 23(b) of the Federal Power Act to be established on the "effect" theory without the basic finding that the waters in which the interests of interstate or foreign commerce are assertedly affected are used or suitable for use for the transportation of persons or property in interstate or foreign commerce. This is in direct conflict with the cited prior decisions.

The Court below appears to hold that by affirming Respondent's jurisdiction only under the "effect" theory of Section 23(b), and by assuming "navigability" of only the first 4800 feet of the stream, it thereby avoids the need to resolve the cardinal issue of "commerce." However, the evidence adduced by Respondent's Staff in support of its attempt to satisfy the "commerce" requirement was not peculiar to the first 4800 feet of the Clyde. All of the evidence on the "commerce" issue was general to the stream, in its entirety. Since the Court below did not hold that such evidence was sufficient to satisfy the "commerce" requirement, and hence to impose "navigability", on the stream in its entirety, there was and is no basis for a holding that it was sufficient to impose "navigability" on the first 4800 feet of the stream as a separate unit.

Since the Court of Appeal's affirmance must ultimately rest, as a matter of Constitutional necessity, upon a predicate of "commerce," it gives implicit sanction to the findings made by Respondent on this subject. Yet each of the factors upon which Respondent relied is either in conflict with prior decisions of this Court or other Courts of Appeal or poses a novel question.

Respondent relied upon four matters to establish "commerce" in support of its conclusion that the Clyde was "navigable waters of the United States.".

(a) Local Pleasure Boating

The first of these was based on evidence of wholly intrastate pleasure boating on portions of the stream. This, Respondent speculated, "could be continued into Canada" on Lake Memphremagog (R. 1745, 1748).

Even if we assume, *arguendo*, that the record contained substantial evidence of such intrastate pleasure boating on the Clyde, that evidence cannot satisfy the requirements for a showing of "commerce." *United States* v. *The Montello*, 87 U. S. 430 (1874); *Harrison* v. *Fite*, 148 Fed. 781, 783 (C. A. 8 1906); *United States* v. *Ross*, 74 F. Supp. 6, 9 (D. C. Mo. 1947). Respondent's reliance upon such intrastate pleasure boating to show "commerce," and the affirmance by the Court below, pose a direct conflict with the cited decisions

Furthermore, the Court of Appeals' implicit approval of Respondent's speculation that such pleasure boating "could be continued" in foreign commerce is also at odds with decisions of this and other Courts. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229-230 (1938); *Gulf Refining Co.* v. *Mark C. Walker & Son Co.*, 124 F. 2d 420, 425-426 (C. A. 6 1942); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 867 (C. A. 2 1938); *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. 2d 985, 989 (C. A. 4 1938).[1]

[1]Respondent's Commissioner Kline put his finger on this error. He said (R. 1753):

> "The majority, despite the lack of substantial supporting evidence in the record, has chosen to draw inference after inference as to commercial uses which 'could be'; 'could have'

b. Indian Use

The second basis of Respondent's finding of "commerce" rests upon alleged use of the stream as an Indian travel route between Canada and the colonies in Colonial times (R. 1748). However, even Respondent recognized the inadequacy of alleged Indian use of a stream to sustain a finding of "commerce" when, without benefit of evidence, it proceeded from that finding to speculate that such Indian use made the stream "suitable for use by fur traders and trappers" (R. 1748). There was not one word of evidence in the record to suggest the existence at any time of fur traders and trappers in the area.

Aside from the fact that the record clearly shows, as indeed the Chief Presiding Examiner found (R. 1612), that the only evidence of Indian use of the stream was based upon one journey, from which it could not even be determined whether the Indians had used the stream as a means of water conveyance (R. 718 *et seq.*), there has never been a case in which either Respondent or any Court has grounded a finding of "commerce" upon such insignificant, indeed ephemeral, evidence.

If Respondent's jurisdiction truly extends to every stream in this Country along or over which Indians may have travelled in Colonial times, for whatever purpose, then the importance of such a holding is equalled only by its novelty and should be decided authoritatively by this Court.

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or 'probably' existed on the stream * * *. Similarly, the smallest pleasure boats 'could be' commercial carriers to the lake * * *.

"The Examiner pointed out, among other things, that no witness had ever observed any commercial boating or commercial use of the river other than the floating of logs, despite the fact that many witnesses had lived in the immediate area and had observed the river for 70 to 80 years; * * *".

c. Log and Pulp Wood Transportation

The main body of evidence upon which Respondent's Staff relied for its showing of "commerce" stemmed from evidence of the transportation of logs and pulp wood on the stream (R. 1748). There is no doubt that under the cases, transportation of forest products may, under certain specific circumstances, suffice to support a finding of use or suitability for use of a stream for transportation of persons or property in interstate or foreign commerce. *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. A. 7 1945), cert. den. 325 U. S. 880; *State of Wisconsin* v. *Federal Power Commission*, 214 F. 2d 334 (C. A. 7 1954); *Wisconsin-Michigan Power Co.*, 3 FPC 449. See also, *Namekagon Hydro-Electric Co.* v. *Federal Power Commission*, 216 F. 2d 509 (C. A. 7 1954). However, each of these cases has required specifically that the evidence show that the transportation of logs or pulp wood be in the course of a continuous interstate or foreign journey by water on the stream.

Here the Commission found (R. 1746):

> "There is no direct evidence in the record that the logs floated down the Clyde River or brought up the Clyde from the Lake were sold outside the State of Vermont, but, of course, there is no reason why they could not have been sold in other states or Canada."

The Commission also found (R. 1748):

> "While the record does not show that the particular logs cut along the Clyde and floated down it were transported as such or in the form of lumber or pulp to other states or to Canada, this probably occurred * * *."

The fact is, as Respondent's own Decision concedes, that this record does not demonstrate any transportation of

logs or pulp wood by floatation on waters in interstate or foreign commerce (R. 1608-1610). Respondent's reliance on this evidence for a showing of "commerce", and the affirmance by the Court below, is a departure from accepted standards and creates a plain conflict between that holding and the decisions which have been cited.[1] This conflict is important, for if local, intrastate log or pulp wood transportation on water is alone sufficient to create Federal Power Commission jurisdiction, then the area of such jurisdiction is infinitely extended beyond that which has previously been defined. Such extension presents a novel and important question for this Court.

d. Improvability of the Stream

The Court below made its only reference to "commerce" when it said (Appendix B, *infra*, p. 6a):

> "It must always be remembered that in constructing subchapter I of chapter XII of Title 16, United States Code, we are to take into consideration, not alone the condition of the stream as it is, but that 'it is proper to consider the feasability of interstate use after reasonable improvements which might be made.'"

Petitioner's position does not in any way involve a re-argument of this Court's decision in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940). Had there been any evidence in the record to show that by dint of improvements which might have been made to any portion of this stream at a cost reasonable in relation to the commerce to be served (311 U. S. 377, at p. 408), the

[1] To overcome this plain conflict, Respondent actually went as far as to urge in the Court below that interstate floatation of logs, followed by possible (undisclosed in this record) shipment of finished products out of the State by means of transport other than water, was sufficient.

Clyde could be made into navigable waters of the United States, we would have no more to say on this "commerce" point.

However, we flatly state that Respondent's Staff introduced no evidence to show the improvability of any portion of the stream, or the feasability of use of any portion of the stream for interstate or foreign commerce after improvement. Significantly, the Court, aside from its paraphrase of what is undoubtedly good law, referred to no such evidence. Indeed, the only evidence on this subject was introduced by Petitioner. A report (R. 1456-1459) prepared by the New York District Corps of Engineers, United States Army, in September, 1954, stated that the streams draining into Lake Memphremagog, specifically including the Clyde, are "not navigable" and "there is no likelihood of * * * establishment of commercial navigation on the lake."

In fact, more than 125 years ago a report (R. 1376-1378) of a survey contained a proposal to improve the travel route between the Connecticut River and Lake Memphremagog. That report recognized the utter impossibility of improvement to the Clyde when it proposed that in place of the Clyde River a completely man-made, artificial canal be built parallel to the stream for its entire length except for the first mile from its mouth and some of the ponds.

In sum, the Court of Appeals was required under clearly established case law to pass upon and decide whether "commerce" had been satisfactorily shown by the evidence. It did not do so. Nevertheless its affirmance implicitly approves the findings on that subject made by Respondent. Those findings, we submit, are in conflict with the decisions of this and other Courts and should be reviewed.

2. The Court below holds that all dams located on non-navigable waters of the United States, or on non-navigable tributaries of such waters, are within Federal Power Commission jurisdiction irrespective of the kind of "effect" which such dams have upon the interests of interstate or foreign commerce in downstream navigable waters of the United States. The Court below says it will not measure or appraise the "effect" which has been found. *Any* effect suffices to create jurisdiction under Section 23(b) of the Federal Power Act. Appendix B, *infra*, p. 7a.

The erection and operation of a dam in any body of water necessarily has the result that to the extent of its impounding capacity the time when the impounded waters will otherwise reach a downstream point will be delayed. This is so whether the dam be located on an admittedly interstate waterway or or an intrastate pond, stream or river since, with respect to the latter, all such bodies of water flow ultimately into or connect with navigable waters of the United States.

Even if we assume that the first 4800 feet of the Clyde are properly found to be "navigable waters of the United States," the Decision of the Court below upholding jurisdiction under Section 23(b) is in direct conflict with the statute, the Congressional exposition of its purpose, prior decisions of this Court and other Courts and with all other decisions on this subject made by Respondent itself. It is a startling departure from hitherto unambiguous standards of jurisdiction under Section 23(b).

Section 23(b) requires the finding to be made that the interests of interstate or foreign commerce "would be affected." Since every dam has to have *some* "effect" on downstream conditions, it is plain that the statute does not embrace all dams. Section 23(b), and in particular the last proviso thereof, plainly contemplates that some projects

may not have the requisite "effect" to create Federal jurisdiction. The Congressional debates confirm this fact (59 Cong. Rec. p. 7730; 66th Congress, 2nd Session). The coverage was intended to extend to projects in non-navigable waters of the United States only to the extent of preventing those projects from destroying or impairing the navigable capacity of otherwise navigable waters of the United States. See: *United States* v. *Appalachian Electric Power Co.*, 107 F. 2d 769, (C. A. 4 1939), rev. o.g. 311 U. S. 377.

This Court in *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 (1899) clearly defined the Constitutional limitation of Congress' power in this regard. This Court stated, at p. 709:

> "It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson River runs within the limits of the State of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a non-navigable stream. Its waters are taken by the state of New York for domestic uses in the city of New York. Unquestionably, the state of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume

> of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney General to institute proceedings to restrain such appropriation."

This is exactly apposite here. Any appropriation by the State of New York, as supposed by this Court in the *Rio Grande* case, would diminish to that extent the water reaching the Hudson. Certainly, it would delay the time of its reaching the Hudson, if indeed it ever reached that River. Yet this Court held that the scope of the Commerce Clause did not *automatically* reach that situation; that jurisdiction rested upon a showing that the appropriation of water would "substantially diminish" navigability downstream. 174 U. S. 690, at 710.

The rule has always been well understood and consistently applied. In *Georgia Power Co. v. Federal Power Commission*, 152 F. 2d 908 (C. A. 5 1946), cited below, the finding of jurisdiction under Section 23(b) was predicated upon an "adverse effect" upon the navigable capacity of the river at navigable points downstream from the project in question. The effect was such as would at times "render impossible any navigation" or at other times "seriously interfere with navigation."

Four cases decided by Respondent itself on this very subject have uniformly recognized that the "effect" required by Section 23(b) is one which must be of a certain quality in order to create jurisdiction. In *Eastern New York Power Corp.*, 6 FPC, and in *Central New York Power Corp.*, 8 FPC 390, Respondent each time phrased the test in terms of an "appreciable" effect. In *Brazos River Conservation and Reclamation District*, 10 FPC 696, Respondent held that the existence of a "slight possibility of an effect" under

"exceptional circumstances" was too remote to justify jurisdiction under Section 23(b) of the Act.

In D. I. 132 (R. 1444-1454), Respondent, dealing with a section of the Connecticut River, took note of the fact that certain reaches of that stream constitued important navigable waters of the United States. Nevertheless it held that the construction and operation of a dam and reservoir many times the size of the facilities here in question "could not, by any possibility, measurably adversely affect the interests of interstate commerce * * *".

When the Court below states that "It is not necessary for us to measure how much such variation will justify actual intervention by the Commission" (Appendix B *infra*, p. 7a), it departs from the accepted standards applicable to Section 23(b), and creates a novel, and we believe erroneous, rule of law which must result, contrary to all relevant prior adjudications, in automatic Commission jurisdiction over all projects located in waters which are not navigable waters of the United States. This Decision has staggering consequences in the administration of the Federal Power Act. It completely precludes the existence of unlicensed projects in tributaries of navigable waters.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Jesse Climenko
Counsel for Petitioner

REUBEN GOLDBERG
CLIFTON G. PARKER
of Counsel

APPENDIX A

Section 3(8) of the Federal Power Act, Title 16 U. S. C. § 796(8), provides:

> "(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;"

Section 23(b) of the Federal Power Act, Title 16 U. S. C. § 817, provides:

> "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along,

over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No 259—October Term, 1959.

(Argued April 8, 1960 Decided May 24, 1960.)

Docket No. 25705

CITIZENS UTILITIES COMPANY,
Petitioner.

—v.—

FEDERAL POWER COMMISSION,
Respondent.

Before:

LUMBARD, *Chief Judge,*
HAND and HINCKS, *Circuit Judges.*

On petition to review an order of the Federal Power Commission, determining that the Clyde River in Vermont is "navigable water of the United States" within the meaning of the Federal Power Act, and that, even though the entire river may not be navigable, the operation of the petitioner's hydroelectric dams across the river "affects interests of interstate or foreign commerce."

MILTON S. GOULD, GALLOP, CLIMENKO & GOULD, New York City, REUBEN GOLDBERG, Washington, D. C., CLIFTON G. PARKER, Morrisville, Vt., *for petitioner.*

JOHN C. MASON, Deputy Gen. Counsel, Federal Power Commission, Washington, D. C., *for respondent.* (WILLIARD W. GATCHELL, Gen. Counsel, HOWARD E. WAHRENBROCK, Solicitor, LEONARD D. EESLEY, Assistant General Counsel, DANIEL GOLDSTEIN and JOSEPH B. HOBBS, Attys., Federal Power Commission, Washington, D. C., on the brief).

Appendix B

HAND, *Circuit Judge*:

In this case the petitioner, a Delaware corporation, has built hydroelectric dams at several places on the Clyde River, Vermont, which rises in the northeast corner of the state and empties into Lake Memphremagog at Newport, Vermont. Lake Memphremagog itself extends from Newport across the border of Canada and into Canada.

After leaving a small pond, called Spectacle Pond, the Clyde passes through Island Pond, another small sheet of water, whence it meanders for six or seven miles until it is joined by a brook that carries the overflow of two other ponds, Seymour Lake and Echo Pond, at East Charleston. The Clyde continues for about five miles further, passing through Pensioner Pond and thence through Salem Pond until after three miles or so it passes through Clyde Pond and after about two miles more reaches Lake Memphremagog. The petitioner had already built dams at the outlets of Seymour Lake and Echo Pond and also across the river at West Charleston and at Clyde Pond. Another dam above the West Charleston dam had been built at Barton Village which the petitioner does not control. The occasion of this suit is the petitioner's construction of a new project including a "diversion dam," a canal, and a power plant, called Unit No. 11, across the river below the dam at the outlet of Clyde Pond.

In June 1957, the Commission began to investigate this partially completed power project in order to determine whether it was in the public interest to control it in order to preserve the navigation and water supply of the Clyde. In preliminary negotiations the parties stipulated that the petitioner should be free to oppose the jurisdiction of the Commission in spite of a "decalaration of intention" made by the petitioner. The Commission held extensive hearings before a presiding examiner who wrote a decision declaring

that the Clyde was not "navigable water of the United States" except for the first 4800 feet from its mouth, but that the petitioner's proposed Unit No. 11 and its Newport project affected the interests of interstate or foreign commerce in that part of the stream, and that the Commission therefore had jurisdiction under §817 of Title 16, United States Code, to grant or refuse a license to maintain both projects. The Commission reversed the examiner and found the whole river navigable, apparently from Spectacle Pond to its mouth, and also that not only Unit No. 11 and the Newport project affected the navigability of the river, but that the petitioner's other projects did so. The petition is to review all parts of the Commission's order.

There can be no doubt that the Clyde Pond dam and Unit No. 11 both have an effect upon the navigability of the river in its last 4800 feet. Indeed, the petitioner does not dispute that the volume of water that reaches the river below the Unit No. 11 changes when the "diversion dam" and the Clyde Pond dam are opened, as they are when hydroelectric generators at Unit 11 and at the Newport project are operated. It was proved that when the dams were opened, the height of the water below the Unit 11 rose eighteen inches and did not assume the level of the Lake until it reached Gardner Park Bridge at a distance of more than half a mile away. There was also evidence that the shutdown of Unit No. 11 made a sixteen foot-boat with four passengers and 1800 pounds of freight repeatedly scrape bottom, although when the dam was opened the boat moved without touching. Again, when the power was shut off and the dams were filling, rocks showed above the water in the stream that were covered when the power was put on again. There was a regular correlation between the two, showing changes in total water volume at times of between 12 and 282 cubic feet per second.

Appendix B

The petitioner's dams at West Charleston being about ten miles above the Clyde Pond dam, and those at Seymour Lake and Echo Pond being about twenty miles away, it is, of course, true that the effect of the "diversion dam" at Unit No. 11 and of the Clyde Pond dam upon the navigable part of the river is much more immediate than that of the dams upstream, but the water impounded by the upper dams can in the end escape only through that last mile, and the dams give the petitioner control over the time when it shall arrive. We omit the Barton Village project that does not belong to the petitioner; but Seymour Lake and Echo Pond together impound 4500 "acre feet" of water as against only 1000 "acre feet" impounded by the Clyde Pond dam. It cannot be said that the "effect" of the petitioner's control of so much water tributary to the navigable part of the river is so inconsiderable as to be beyond the scope of § 817, that is to say, that "interest of interstate or foreign commerce would" not "be affected by the construction of a dam" of the kind here at issue. The money question before us is as to the jurisdiction of the Commission, not how far the public interest requires the Commission to regulate their maintenance and use. It must always be remembered that in construing subchapter I of chapter XII of Title 16, United States Code, we are to take into consideration, not alone the condition of a stream as it is, but that "it is proper to consider the feasibility of future use after reasonable improvements which might be made." *United States* v. *Appalachian Power Company*, 311 U. S. 377, 409. Since there can be no doubt that the last mile of the river is "navigable" without change, the only question is whether the amount of water by which the petitioner can vary its flow affects that part of the river enough to give the Commission jurisdiction over the granting of a license.

It is not necessary for us to measure how much such variation will justify actual intervention by the Commission. The "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive" (§825 l(b)), and it is apparent that the evidence was enough to prove that the petitioner's dams, without change and at the will of the petitioner, are capable of "affecting" temporarily the flow of water in the river below Unit 11, and, indeed, that they do so in the ordinary operation of the petitioner's business. The situation appears to us to be essentially the same as in *Federal Power Commission v. [illegible] River Power Company*, 132 Fed (2d) 908, 913 (C. A. 5).

Concluding as we do that the petitioner's dams on the Clyde River do "affect" the navigability of the last mile of that river, it becomes unnecessary for us to decide how much if any of the river above Unit No. 11 is "navigable." That question therefore we leave open.

The order of the Commission requiring an application for license is affirmed on the limited ground stated above.

Appendix B

Decree

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 259 — October Term, 1959

CITIZENS UTILITIES COMPANY,
Petitioner,

—v.—

FEDERAL POWER COMMISSION,
Respondent.

Before:

LUMBARD, *Chief Judge,*
HAND and HINCKS, *Circuit Judges, in Chambers*

Decree

Pursuant to the opinion of this court filed on May 24, 1960, it is

ORDERED by the court that the orders issued by the Federal Power Commission on February 16, 1959 (21 FPC 233) and April 3, 1959 (21 FPC 455) which require that Citizens Utilities Company apply for a license under the Federal Power Act for operating and maintaining its hydroelectric project works on the Clyde River, including one of its tributaries, in Orleans County, Vermont, are affirmed.

Per Curiam.

Dated: June 7, 1960

J. EDWARD LUMBARD
Chief Judge

LEARNED HAND
Circuit Judge